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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GEORGE MISKOVSKY,
Petitioner,

v.

THE OKLAHOMA PUBLISHING COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

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QUESTIONS PRESENTED FOR REVIEW

1. Does the United States Constitution supplant state defamation law on the issues of defamatory meaning, opinion, and burden of proof as to truth?

2. Assuming the editorial cartoon was defamatory and a statement of fact, was there sufficient evidence of actual malice under the standard of *New York Times* v. *Sullivan* for the editorial cartoon to be submitted to the jury?

3. Assuming expressions of pure opinion are constitutionally protected under *Gertz* v. *Welch*, was there sufficient evidence of undisclosed defamatory facts in the three articles and in the editorial for the issue of defamation to be submitted to the jury?

4. Does the United States Constitution require a balancing between the rights of the media defendant and the rights of candidates for public office to freedom of speech and protection of reputation?

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Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, Am. Bar Foundation Research J. 493 (Summer 1980)	29
R.D. Sack, *Libel, Slander, and Related Problems* 83 (1980)	23
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THE OKLAHOMA PUBLISHING COMPANY,

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

Petitioner George Miskovsky respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of Oklahoma, entered on January 12, 1982, reversing the libel judgment on a jury verdict for petitioner in the sum of one million dollars, and remanding the case with instructions to dismiss.

OPINION AND ORDER BELOW

The opinion of the Oklahoma Supreme Court, which appears in the Appendix at 1a, has been officially reported at Vol. 53 Oklahoma Bar Journal 76. The order of the Oklahoma Supreme Court denying petitioner's motion for rehearing appears at Appendix 19a.

JURISDICTION

The opinion of the Oklahoma Supreme Court in this case was issued on January 12, 1982. The order denying petitioner's motion for rehearing was issued on April 6, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

1. United States Constitution, Amendment I:

   Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

2. United States Constitution, Amendment XIV § 1:

   [N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

A. PROCEDURAL BACKGROUND

Petitioner George Miskovsky [hereinafter "petitioner" or "Miskovsky"], a candidate in 1978 for the United States Senate, instituted this action for libel in the District Court of Cleveland County, Norman, Oklahoma. The libel arises out of three newspaper stories dated August 11, 1978, an editorial dated August 11, 1978, and a cartoon dated August 14, 1978, all appearing in newspapers published by respondent Oklahoma Publishing Company [hereinafter "OPUBCO"]. In its answer, OPUBCO pleaded the affirmative defenses of privilege, truth and fair comment.

In an effort to prevent a trial by jury, OPUBCO sought stay orders in both the Oklahoma Supreme Court and the United States District Court for the Western District of Oklahoma. These applications were denied and the case was tried before a jury in the District Court of Cleveland County, Oklahoma, on May 19-21, 1980. At the conclusion of petitioner's case, the trial court denied OPUBCO's motion for a directed verdict, thus ruling that petitioner had submitted sufficient evidence of actual malice under the First Amendment for the factual issues to be resolved by the jury. (Vol. III, 161)[1] OPUBCO chose to present no evidence whatsoever.

After approximately six hours of deliberation, the jury awarded damages to petitioner in a total amount of one

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[1] References are to the volume and page number of the Official Court Reporter's Transcript. The transcript of each day's proceedings is numbered separately.

million dollars, $35,000 actual damages and $965,000 exemplary damages. (Vol. III, 237-238) Immediately thereafter, the trial judge denied both OPUBCO's oral motion for judgment notwithstanding the verdict and motion for mistrial. (Vol. III, 239-240)

B. IDENTIFICATION OF PARTIES

1. Petitioner George Miskovsky, son of immigrant parents, was born and raised in Oklahoma. He graduated from the University of Oklahoma Law School with high honors, including induction into Order of the Coif. Upon graduation from law school, Miskovsky was admitted to the Oklahoma Bar. He has practiced law in Oklahoma City for more than forty years. During his career, Miskovsky has served as Public Defender, County Attorney, State Representative, and State Senator. In 1958, he was a candidate for Governor. Twenty years later, at the age of sixty-eight, Miskovsky became a candidate for the office of United States Senator. (Vol. I, 4-12)

2. Respondent OPUBCO, a multi-media conglomerate, is a privately held corporation controlled by the Gaylord family since Oklahoma statehood. OPUBCO publishes three newspapers in Oklahoma and one in Colorado Springs, Colorado. In addition, OPUBCO owns seven television stations, three radio stations, including Gaylord Broadcasting Company, and numerous other diversified holdings. (Vol. III, 2-4) The OPUBCO newspapers involved in this case are *The Daily Oklahoman* and *The Oklahoma City Times*. These papers have a combined circulation of approximately 295,000 daily copies and 300,000 Sunday copies and are distributed throughout the state of Oklahoma. (Vol. III, 3-5)

C. FACTUAL BASIS OF THE LIBEL CLAIM

1. The Press Conference

On August 9, 1978, during the course of the United States Senate primary race, petitioner attended a candidate's forum in El Reno, Oklahoma, sponsored by the Women's Democratic Club of Canadian County. The

forum was open to all candidates, including Governor David Boren, State Senator Gene Stipe, former Congressman Ed Edmondson, Dean Bridges, Rosella Saker and Anthony Points. Besides Miskovsky, only candidates Bridges and Points chose to attend. The opinion of the Oklahoma Supreme Court describes the forum:

> While addressing the group, candidate Points read from a political flyer, copies of which he had distributed to the audience. In part the flyer stated:
>
> > 'I am against homosexuals or bisexuals in office or government. They are threats to our national security. They are subject to being blackmailed and will give out a favor or leak information from the government in return for having their homosexual identity kept secret.
> >
> > There is a side of David Boren that is a known fact in legal and political circles. And that's the fact that David Boren frequents with homosexuals and I'm putting it lightly.
> >
> > I don't think that is what you want for a U.S. Senator.'
>
> In addition to reading these remarks, candidate Points categorically stated that 'Governor David Boren is a homosexual.' (App. 2a)

Miskovsky and others in attendance were amazed at the unequivocal statement which Points had made. Although Miskovsky had been aware of "widespread discussions and beliefs and rumors throughout the state for—to my knowledge about two years—" (Vol. I, 19), he had no belief one way or the other about the rumors or Points' statement. (Vol. I, 79)

After hearing the allegations, Miskovsky "waited to see if there was anything done about it . . . considered it," and debated with himself whether he should call it to the "people's attention" because "the people had a right to have that question asked." (Vol. I, 20) The following day, August 10, Miskovsky delivered a letter to Governor Boren's office. The letter quoted in full the

charges made by Points and requested the Governor to answer under oath the following questions:

> Do you know what a homosexual or bisexual is?
>
> Are you a homosexual or bisexual?
>
> Have you ever been a homosexual or bisexual?
>
> Have you ever engaged in homosexual or bisexual activity? (App. 4a)

The letter makes clear that Miskovsky himself was making no allegations about Governor Boren. (App. 3a-5a) Aware that the letter was newsworthy, Miskovsky called a press conference that same day at which he made copies of the letter available to members of the news media. (App. 5a)

2. OPUBCO's Reaction

OPUBCO reporters covered the press conference and received copies of the letter.[2] OPUBCO Managing Editor Jim Standard, head of the State Capitol Bureau Ed Montgomery, and many other OPUBCO reporters had been aware of these rumors about Governor Boren for at least two to three years. (Vol. II, 85, Vol. III, 91-92) Managing Editor Standard had even discussed the matter with Boren as early as 1976. (Vol. II, 83)[3]

The next day, August 11, OPUBCO published three news articles and an editorial dealing with Points' charges, Miskovsky's press conference, and the Governor's response to these events. The first article appeared in *The Daily Oklahoman* with the headline, "Sex Charge a Lie, Governor Boren Replies." Within the article, OPUBCO planted the seed that a conspiracy existed between Miskovsky and Points:

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[2] As discussed *infra*, OPUBCO vigorously endorsed Governor Boren's campaign.

[3] Governor Boren's staff members also were aware of the rumors. They did not know how to deal with them and were relieved that the matter had finally become public. (Pl's Ex. 9)

> Asked if he thought Miskovsky and Points worked together to discredit him, Boren replied, 'I will just have to leave that to your speculation.' (App. 21a)

Inserted within that article is the caption, "Miskovsky and Mud—an editorial—page 10."

Immediately below this article appeared a second article headlined, "Miskovsky, Points Lashed-Allegations Stir Storm":

> Allegations against Governor Boren raised by fellow U.S. Senate candidates George Miskovsky and Anthony Points spurred a storm of indignation.
>
> • • • •
>
> Rob Pyron, Boren's campaign secretary, said campaign headquarters was swamped with calls Thursday afternoon from persons voicing support for the Governor and anger over the allegations of Points and Miskovsky.
>
> • • • •
>
> The [Tulsa] World said Miskovsky won a place in state history saying he 'took the prize for the filthiest stunt that has ever been pulled by a serious candidate for major public office in this state.'
>
> Oklahoma City radio station KTOK said the names of Miskovsky and Points should be stricken from the ballot.
>
> Such loathsome and degrading statements, which have been made with no proof, speak eloquently of the kind of statesmanship either Miskovsky or Points would lend to the U.S. Senate if they were elected. [KTOK radio said.]
>
> The Shawnee News-Star editorialized in Friday editions that 'Cesspool allegations have no place in the political arena. We believe that George Miskovsky has no place in it any longer either.' (App. 23a-25a)

The third article appeared in *The Oklahoma City Times* and was captioned, "Boren's Friends Express Disgust." It stated in part:

> Longtime friends and close associates of Gov. David Boren expressed shock and disgust in his hometown

> today after allegations surfaced Thursday that he is a homosexual.
>
> • • • •
>
> I'm really shocked. I just can't believe it, [Boren's former pastor] said of the allegations.
>
> • • • •
>
> Ward Lynn, father-in-law of Boren's press secretary, Rob Pyron, said he expected Miskovsky to be the "hatchet man" in the campaign. (App. 26a)

The editorial of the *The Daily Oklahoman*, which accompanied the first and second articles, was entitled, "Miskovsky and Mud." It contained false and defamatory statements:

> George Miskovsky has sunk to a new low in Oklahoma political rhetoric—and for him that takes some doing.
>
> In a press conference reported on elsewhere in The Oklahoman, the septuagenarian lawyer has attempted to inject some sign of vitality in his moribund campaign for the Democratic nomination for the U.S. Senate.
>
> His tactic was to indirectly suggest, in the form of a letter asking questions, that Gov. David Boren has homosexual tendencies.
>
> Were it not for the fact that American law and tradition make it virtually impossible to libel or slander a political figure, Miskovsky's words would be actionable. As it is, they are merely despicable and stupid. (App. 27a)

The editorial went on to state that Boren's Senate candidacy should be weighed on the record and on the positions taken on national issues and "not on the scurrilous defamation hurled by Miskovsky. . . . Miskovsky should save his gutter theatrics for the next time he is defending some scoundrel in criminal court." (App. 28a)

Also published in *The Daily Oklahoman* on August 11 was the caption, "First Lady Molly Boren kisses Gov.

David Boren upon his arrival in Oklahoma City for a press conference to refute fellow U.S. Senate candidate George Miskovsky's allegations." (Pl's Ex. 23)

On August 14, *The Oklahoma City Times* published an editorial cartoon captioned, "Isn't That Right, Anthony?" This was an effigy falsely depicting Miskovsky as a puppeteer who was holding and manipulating a puppet, Points. (App. 29a)

D. THE LIBEL TRIAL

As recognized by the Oklahoma Supreme Court, the evidence at trial conclusively established that Governor Boren was the favored candidate of OPUBCO. (App. 17a; Vol. II, 21, Vol. III, 11, 93) OPUBCO's endorsement of Boren was shown, for example, in an editorial cartoon entitled, "Boren vs. Borin," which appeared on August 16, 1978. The cartoon depicted all the major candidates except Boren. Senator Gene Stipe is depicted with the words, "I am not a Crook!"; former Congressman Ed Edmondson is depicted with the words, "I am not a Has-Been!"; former Senator Miskovsky is depicted with the words, "I am not GAY!"; and John Q. Public is depicted with the words, "I am not a Bit Interested!" (App. 30a)

OPUBCO's favoritism of Governor Boren was also shown by its failure to make Points' statement public although it had a copy of the statement *prior* to Miskovsky's press conference. Because Miskovsky chose to let the voters know about Points' statement, OPUBCO decided to engage in a course of conduct designed to damage Miskovsky's reputation and to harm his campaign. On the afternoon of August 10, following the press conference, Managing Editor Jim Standard in a discussion with Publisher Edward L. Gaylord notified Gaylord that "tomorrow we are really going to *blister* [Miskovsky]." (Vol. II, 147) (Emphasis added.) The references to Miskovsky's profession and the statement that he should "save his gutter theatrics for the next time he is defend-

ing some scoundrel in criminal court" were intended by Standard to be a "good example . . . so the readers would understand what was going on." (Vol. II, 147)

Against this backdrop, OPUBCO published the damaging articles, editorial and cartoon even though OPUBCO actually knew that Miskovsky had made no allegation about Governor Boren. Moreover, prior to publication, OPUBCO failed to conduct any investigation concerning the asserted connection between Points and Miskovsky.[4] Managing Editor Standard admitted that at no time did he believe there was any such connection. (Vol. II, 105) Simply put, OPUBCO knew better than to imply that a conspiracy existed between Points and Miskovsky to harm Governor Boren. (Vol. II, 124-125)

In regard to the "puppet" cartoon, editorial cartoonist Chan Lowe testified that in drawing the cartoon he relied upon the information appearing in the OPUBCO news articles. (Vol. III, 114) The conspiratorial point of the cartoon was shown by the admission at trial of Assistant Managing Editor Robert E. Lee who testified:

> Q. Does that—do you feel that that gives the impression to the public that George put him up to that?
>
> A. I would hope so. I think that is what Chan was trying to do, and if they didn't give the public the impression, then he wasn't doing a very good job, was he? (Vol. II, 34)

---

[4] Only after the publication of the articles in question did OPUBCO's chief investigative reporter Jack Taylor conduct any investigation regarding a possible link between Points and Miskovsky. The investigation revealed no connection whatsoever between Points and Miskovsky, but did indicate that Points was not what he represented himself to be. Although the investigation developed no relationship between Miskovsky and Points, OPUBCO in its news articles never publicized this fact and continued to link Miskovsky and Points. On August 30, 1978, OPUBCO published two separate full-page articles headlined, "Thwarted Miskovsky Denies 'Gay' Charge Link" and "Who is Anthony Points?" (Pl's Ex. 18; Vol. II, 184-185)

At the conclusion of the trial, the court properly submitted the three articles, editorial and cartoon to the jury for determination of whether they singly or in combination libeled Miskovsky. The court carefully instructed the jury concerning the applicable law. The test of actual malice as articulated by this Court in *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), was given to the jury almost verbatim:

> In order to prove that he has been libeled by the defendant, plaintiff must prove the publications were knowingly false or were published with reckless disregard of whether they were true or not. (Instruction 14, App. 38a)

The Court further explained the *New York Times* requirement:

> Proof of malice requires evidence showing that the defendant published the material complained of with an awareness of the probable falsity of the publications or that there be sufficient evidence to permit the conclusion that the defendant, through its agents, published the alleged defamatory writings and cartoons with reckless disregard of the truth of the publications in order for the plaintiff to be entitled to recover damages from the defendant. (Instruction 14, App. 38a)

In addition, the trial court correctly stated the "clear and convincing" proof requirement and admonished the jury that this was a "much higher" burden than preponderance of the evidence. (Instruction 5, App. 35a) At OPUBCO's request, the court gave the following additional instruction:

> Everyone has the right to comment and express their opinion, especially on matters of public importance. Misstatements of fact in expressions of opinion are protected unless they are made with malice as defined in these instructions for the purpose of damaging another's reputation. Expressions or statements of opinion cannot be held to be libelous. This is true even though those expressions of opinion may be harsh, vituperative, and embarrassing to the Plaintiff. (Instruction 13, App. 37a-38a)

Thus a properly instructed jury, after hearing the evidence and after careful deliberation, concluded that OPUBCO had in fact libeled George Miskovsky.

E. FEDERAL QUESTIONS PROPERLY RAISED

The federal questions raised in this Petition were properly raised before the Oklahoma Supreme Court. As discussed above, petitioner timely submitted to the trial court proposed jury instructions that properly reflected the requirements of the United States Constitution on the issues of falsity, defamatory meaning, opinion and actual malice. (App. 35a, 38a) The instructions actually given by the trial court, though not precisely those sought by petitioner, submitted these issues substantially correctly.[5]

The parties agreed that the United States Constitution required the Oklahoma Supreme Court to conduct its own independent review of the evidence to make certain that controlling constitutional principles had been properly applied. Appellant's Brief at 20-22; Appellee's Brief at 26-29. Petitioner contended, however, that the scope of this review was limited to that required by the constitutional principles of *New York Times* and denied that the Constitution required "the kind of wide-ranging appellate review sought by OPUBCO in this case." Appellee's Brief at 26-28. Petitioner argued that "[o]nce the *New York Times* standard is satisfied, the states are free to impose liability in accordance with their own common law or statutory precepts." Appellee's Brief at 24. The question of the extent to which these issues are controlled by federal constitutional law thus was squarely presented to the Oklahoma Supreme Court.

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[5] The only exception concerns Instructions 5 and 20, which assigned to plaintiff the burden of proving falsity. (App. 34a-35a, 41a) Petitioner's contention is that with respect to this issue, the instructions were more favorable to OPUBCO than the Constitution requires.

REASONS FOR GRANTING PETITION

I. THIS COURT SHOULD GRANT REVIEW BECAUSE THE DECISION OF THE OKLAHOMA SUPREME COURT RAISES AN IMPORTANT FEDERAL QUESTION NOT DECIDED BY THIS COURT CONCERNING THE EXTENT OF FEDERAL CONSTITUTIONALIZATION OF STATE DEFAMATION LAW.

When this Court ruled in *New York Times* that the First Amendment requires a public figure to demonstrate actual malice in order to prevail in a libel case, the Court did not intend to abolish the common law of libel. The Oklahoma Supreme Court, however, erroneously concluded that under *New York Times* and its progeny the Oklahoma law of libel had been supplanted by federal constitutional law.

The jury by its verdict implicitly found that the respondent had defamed petitioner, that respondent's statements were false, that respondent's publications were not protected statements of opinion, and that respondent published with actual malice. The Oklahoma Supreme Court reversed the judgment entered pursuant to this verdict, not because of any error in the instructions under which the case was submitted, but on the ground that petitioner's evidence on the issues of defamation, falsehood and malice was constitutionally deficient. (App. 9a)

It is apparent from the opinion of the Oklahoma Supreme Court that the court incorrectly believed that state law on all of these issues had been both superseded and controlled by the requirements of the Constitution.[6] Except

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[6] The Oklahoma Supreme Court would not have overturned the jury verdict on state law grounds because of the limited appellate review of jury verdicts under Oklahoma law. In *Wat Henry Pontiac v. Pitcock*, 301 P.2d 203, 207 (Okla. 1956), the Oklahoma Supreme Court held:

> In a law action the verdict of the jury is conclusive as to all disputed facts and all conflicting statements, and where there is any competent evidence reasonably tending to support the verdict of the jury, this court will not invade the province of

for one case cited to show the applicability of *New York Times* to candidates for public office (App. 18a, n.1), the court did not cite a single Oklahoma case. Nor did the court cite the Oklahoma statute which establishes the standards governing libel actions. (App. 31a) The court did not refer to state standards of judicial review, but instead discussed extensively the requirements of *New York Times*. After this preface, the court then examined the evidence with respect to each of the five publications alleged to be libelous.[7] The court drew no distinctions regarding the source of law or the standard of review applicable to the issues of defamation, falsehood and malice. To the contrary, the court obviously assumed that federal law controlled and that under federal law the court was required to engage in the same type of *de novo* review with respect to each issue before the court.

It is now well settled that the finding of actual malice is a "constitutional fact" subject to *de novo* review by this Court. *See Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 54 (1971) (plurality opinion); *Time, Inc.* v. *Pape*, 401 U.S. 279, 284 (1971). Petitioner acknowledges that it is appropriate for a state appellate court to engage in a similar review of evidence on the issue of actual malice. *Cf. Pickering* v. *Board of Education*, 391 U.S. 563, 578,

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the jury and will not disturb its verdict and judgment based thereon. *Wiggins* v. *Sterne*, 293 P.2d 603, 604 (Okla. 1955).

The Oklahoma Supreme Court has held that this very narrow standard of review applies to defamation actions under state law and that in such an action "[w]e do not weigh the evidence or the correctness of the finding of the facts by the jury." *Akins* v. *Altus Newspapers, Inc.*, 609 P.2d 1263, 1266 (Okla. 1977), *cert. denied*, 449 U.S. 1010 (1980). Just as this Court has concluded that defamation suits are not exempt from the normal rules of discovery, *Herbert* v. *Lando*, 441 U.S. 153 (1979), so also should the traditional Oklahoma policies governing appellate review of jury verdicts be applied.

[7] Petitioner concedes that he is a public figure plaintiff to whom the actual malice requirement of *New York Times* applies.

n.2 (appendix to opinion of the Court) (1968). This Court has never held, however, that the entire tort of libel has been constitutionalized. On the contrary, the Court has sought to minimize the intrusion of federal constitutional law, preserving the authority of the states to apply their own principles of defamation law insofar as those principles are not inconsistent with the demands of the First Amendment. *See Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974). Petitioner's case presents the issue of whether the states are free to apply their own statutory or common law rules to *issues other than the actual malice question* in public figure libel cases.[8] Specifically, the questions are (a) whether the issues of defamatory meaning, opinion[9] and falsity are controlled by federal constitutional law, and (b) whether jury findings on these issues must be subjected to *de novo* appellate review.

The Oklahoma Supreme Court incorrectly held that in order to prevail under *New York Times* petitioner must show:

(1) The publication of a defamatory statement;

(2) That the defamatory statement was false;[10] and

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[8] This Court recently expressed interest in the interplay between the First Amendment and state tort law by granting a writ of certiorari in *Wilson* v. *Scripps-Howard Broadcasting Co.*, 642 F.2d 371 (6th Cir. 1981), *cert. granted*, 102 S.Ct. 500 (1981), *cert. dismissed per stipulation*, 102 S.Ct. 984 (1981). One of the issues raised in Wilson's petition was similar to the question raised by petitioner, *viz.*, whether a plaintiff in a libel action brought against a publisher must shoulder the burden of proof on the issue of truth or falsity of the allegedly defamatory statements.

[9] See discussion of opinion, *infra*, III.

[10] Under Oklahoma law truth is an affirmative defense to a libel action and must be proven by the defendant. *See Hetherington* v. *Griffin Television, Inc.*, 430 F.Supp. 493 (W.D. Okla. 1977). Because OPUBCO failed to prove that the publications were true or even to present any defense whatsoever to the jury—not a single witness or exhibit—petitioner would have prevailed on this issue if the Oklahoma Supreme Court had relied on state law.

> (3) That the defamatory falsehood was made with actual malice—made with knowledge that it was false or with reckless disregard of whether it was false or not. (App. 7a)

Later in its opinion, the Oklahoma Supreme Court repeated that holding, leaving no doubt that the Court assigned the burden to petitioner of proving by "clear and convincing" evidence the falsity of the publications:

> After reviewing the evidence, we conclude that with respect to each publication, Mr. Miskovsky has failed to present evidence of defamation, falsehood, and malice, sufficient to present the issue to a jury. (App. 9a)

Contrary to the assumption of the Oklahoma State Supreme Court, this Court in *New York Times* did not shift the burden to plaintiff to demonstrate the falsity of a defamatory communication.[11] Eaton, *The American Law of Defamation through Gertz* v. *Robert Welch, Inc., and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1381-1382 (1975). Rather, this Court's holding in *New York Times* merely shifts the focus of inquiry from the content of the speech to the conduct of the defendant. Specifically, the Court found that the traditional defense of truth allowed under state law was insufficient, in and of itself, to provide the "breathing space" necessary to

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[11] Subsequent decisions by this Court have continued to refer to truth as a defense. *See, e.g., St. Amant* v. *Thompson*, 390 U.S. 727, 731-732 (1968). Consider also the words of Justice Harlan in *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 151 (1967), that truth is "an absolute defense in almost all cases." *See also* the dissenting opinions of Justice Harlan and Justice Marshall in *Rosenbloom* v. *Metromedia, supra*, 403 U.S. at 65-66 and 86, n.12 (1971). The Reporter's Notes on § 613 of the *Restatement (Second) of Torts* at 150 (1981) characterizes as "contradictory" this Court's language on the question of the burden of proving the falsity of a defamatory communication. Although the plaintiff must prove a false publication, this is easily accomplished because the falsity of a defamatory communication is presumed at common law. *Restatement (Second) of Torts* § 518A, Comment B (1977). Showing a defamatory publication is different from bearing the ultimate burden of proof on the issue of falsity.

protect the First and Fourteenth Amendment rights of free expression. 374 U.S. at 271-272, 278-279.

Thus, the Court in *New York Times* sought to balance the right to free speech and freedom of the press with the right of a public figure to be free from injury to his reputation. Under the "reckless disregard" portion of the actual malice test, public figures are required to demonstrate a high degree of subjective awareness of probable falsity. *St. Amant* v. *Thompson*, *supra*, 390 U.S. at 731; *Garrison* v. *Louisiana*, 379 U.S. 64, 74 (1964). Although "the defense of truth is constitutionally required where the subject of the publication is a public official or public figure," *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 490 (1975), this does not mean that a public figure libel plaintiff is constitutionally required to bear the burden of proving falsity. Eaton, *supra*.

The inequity of requiring a public figure plaintiff in a libel action to prove falsity was clearly pointed out by the Pennsylvania Supreme Court:

> Common decency would seem to require that the defaming defendant have the burden of substantiating the accusations, especially when, in many instances, a defamed but innocent plaintiff may not be able to adduce more evidence than a denial that he or she committed the offense charged.

Corabi v. *Curtis Publishing Co.*, 441 Pa. 432, 468, 273 A.2d 899, 917 (1971).[12] Requiring a media defendant to prove truth after the plaintiff has made a *prima facie* case of libel with actual malice is the sounder public policy. As a practical matter, if the plaintiff fails to prove actual malice under *New York Times*, the defendant need not prove truth as a defense. However, the plaintiff's burden in establishing the defendant's conduct does not

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[12] *See also*, *Rinaldi* v. *Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 386, 397 N.Y.S.2d 943, 366 N.E.2d 1299, 1309 (1977) (Breitel, J., concurring), *cert. denied*, 434 U.S. 969 (1977). Judge Breitel argued that it is virtually impossible for a public official libel plaintiff to prove that he was not corrupt or probably not corrupt as charged in alleged defamatory communication.

eliminate the defendant's burden of proving the truth of a defamatory publication.[13] Conduct and content are not co-extensive.

Freedom of the press under the First Amendment does not include the absolute license to destroy lives and careers. *Gertz* v. *Welch*, *supra*, 418 U.S. at 339-41. The extraordinary protections afforded to the press by the First Amendment carry with them a type of fiduciary duty to exercise the protected rights responsibly. *Nebraska Press Association* v. *Stuart*, 427 U.S. 539, 560 (1976). When the press violates this fiduciary duty, and when a public figure plaintiff can prove actual malice, then the injured party should be entitled to recover for damage to his reputation.[14]

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[13] The American Law Institute in a *caveat* to *Restatement (Second) of Torts* § 613 at 307 (1977) expresses "no opinion on the extent to which the common law rule placing on the defendant the burden of proof to show the truth of the defamatory communication has been changed by the constitutional requirement that the plaintiff must prove defendant's negligence or greater fault regarding the falsity of the communication." *See also*, § 581A and the Reporter's Notes at 478 (1981).

A number of courts have taken the position that where the constitutional privilege applies, the common law presumption of falsity disappears and the plaintiff has the additional burden of proving the statement false. *E.g.*, *Goldwater* v. *Ginzburg*, 414 F.2d 324, 338 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970); *Farnsworth* v. *Tribune Co.*, 43 Ill.2d 286, 293, 253 N.E.2d 408, 412 (1969); *Reaves* v. *Foster*, 200 So.2d 453, 458 (Miss. 1967); *Autobuses Internacionales* v. *El Continental Publishing Co.*, 483 S.W.2d 506, 508 (Tex. Civ.App. 1972). *Cf. Trails West, Inc.* v. *Wolff*, 32 N.Y.2d 207, 214, 344, N.Y.S.2d 863, 866, 298 N.E.2d 52, 54 (1973).

[14] This Court has recognized that in our constitutional system, the state interest in protecting private personality is of coordinate value with First Amendment considerations:

> The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individ-

In sum, this Court should review the Oklahoma Supreme Court decision and decide the extent to which federal constitutional law has supplanted substantive and procedural state law in libel actions.

II. ASSUMING THAT THE EDITORIAL CARTOON WAS DEFAMATORY AND A STATEMENT OF FACT, THERE WAS SUFFICIENT EVIDENCE OF ACTUAL MALICE FOR SUBMISSION OF THE LIBEL ISSUE TO THE JURY.

In its treatment of the editorial cartoon, the Oklahoma Supreme Court assumed, without deciding, that the publication was defamatory and a statement of fact. (App. 15a-16a) The Oklahoma Supreme Court incorrectly held that there was insufficient evidence of actual malice for the matter to be submitted to the jury.

As long as there is sufficient evidence by which a reasonable person might conclude that actual malice was shown with clear and convincing clarity, a jury may return a verdict against a publisher. Proof of actual malice calls into question a defendant's state of mind and does not lend itself to a "summary disposition." *Hutchinson* v. *Proxmire*, 443 U.S. 111, n.9 (1979) Although the Court in *Hutchinson* was discussing the tendency of certain courts to award summary judgment to defendants in libel cases, this holding is also applicable in considering the decision of the Oklahoma Supreme Court. If the state court had correctly applied the constitutional standards for libel, it would have upheld the verdict of a properly instructed jury. Deference to a jury's finding regarding a defendant's state of mind is appropriate because evidence of malice is a question of fact which only a jury can decide.[15] *Herbert* v. *Lando*, *supra*. "The finder of

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ual states under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.

Rosenblatt v. *Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

[15] In its ruling that the cartoon was not actionable, the Oklahoma Supreme Court summarized the publisher's testimony that OPUBCO

fact [and not the appellate court] must determine whether the publication was indeed made in good faith." *St. Amant* v. *Thompson*, *supra*, 390 U.S. at 732.

Relying on *Gertz* v. *Welch*, *supra*, the Oklahoma Supreme Court ruled that OPUBCO's failure to investigate could not form the predicate for a jury finding of malice under *New York Times*. But the Oklahoma Supreme Court misread *Gertz*. (App. 17a) *Gertz* actually says that "mere proof of failure to investigate *without more*, cannot establish reckless disregard for the truth." 418 U.S. at 332 (emphasis added). In short, the Oklahoma Supreme Court failed to properly apply the constitutional law of actual malice. The applicable rule, set forth in *St. Amant* v. *Thompson*, states that "[f]ailure to investigate does not *in itself* establish bad faith." 390 U.S. at 733 (emphasis added). However, where there is sufficient question as to the accuracy of the publication to permit the conclusion that the defendant entertained serious doubts as to the truth of his publication, then publishing with such doubt shows reckless disregard for truth or falsity and demonstrates actual malice. *Id.*, at 731. "[T]he failure to investigate the truth or falsity of the defamatory statement is a fact, which when coupled with other circumstances, may prove, with convincing clarity, the defendant's reckless disregard for the truth." L. H. Eldredge, *The Law of Defamation* § 51 at 255-256 (1978).

The jury in concluding that OPUBCO had demonstrated a reckless disregard of the truth or falsity of its pub-

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did not intend to accuse Miskovsky of criminal libel. (App. 16a-17a) This focus on the intent of the publisher contradicts the evidence that OPUBCO sought to "blister" Miskovsky and disregards a long line of Oklahoma decisions that hold that defamation is determined not by the intent of the editor, but what readers reasonably believed the editor intended to convey. *E.g.*, *Wimmer* v. *Oklahoma Publishing Co.*, 1 P.2d 671 (1931). This distinction is particularly important where the cartoon has a double meaning. *Cf. Greenbelt Cooperative Publishing Association* v. *Bresler*, 398 U.S. 6, 19-20 (1970) (White J., concurring).

lications regarding petitioner was undoubtedly influenced by evidence of petitioner's eminent career in public service. Petitioner has practiced law for more than 40 years in Oklahoma and has often defended unpopular or controversial individuals and causes. He has held numerous public offices and was a serious candidate for the office of United States Senator. In view of petitioner's record and reputation, there were obvious reasons why the jury would naturally and logically conclude that OPUBCO must have had serious doubts about the truth of the charges. The evidence of failure to investigate, coupled with OPUBCO's motives in "blistering" petitioner in order to further the political career of its favored candidate, and the eminence of petitioner's career certainly demonstrated OPUBCO's reckless disregard for the truth.[16]

On facts similar to those found in petitioner's case, the United States Court of Appeals for the Second Circuit affirmed a libel judgment for Senator Barry Goldwater after considering what other circumstances, in addition to failure to investigate, might constitute actual malice.[17]

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[16] In *Garrison* v. *Louisiana*, *supra*, 379 U.S. at 75, this Court stated:

> The use of calculated falsehood, however, would put a different cast on the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity . . . .
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> That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be affected. . . .
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> * * * *
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> Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.

[17] In *Carson* v. *Allied News*, 529 F.2d 206 (7th Cir. 1976), the court found sufficient evidence for a jury to decide if there was

Goldwater v. *Ginzberg*, *supra*, 414 F.2d at 339. Neither the *Goldwater* article nor the cartoon in question contained any "hot news" which might have presented a mitigating factor or would have excused haste in publishing; in fact, the Miskovsky cartoon was not news at all. In *Goldwater*, the court found that the publisher was very much aware of the possible resulting harm. Here the facts are even more egregious because the evidence is undisputed that OPUBCO was more than merely aware of the possibility that harm would result from its publication; OPUBCO affirmatively desired and sought to "blister" petitioner and his reputation to further the electoral prospects of its favored candidate. The publisher's intention "to get" Miskovsky is evidence of actual malice. *Stevens* v. *Sun Publishing Co.*, 270 S.C. 65, 240 S.E.2d 812 (1978), *cert. denied*, 436 U.S. 945 (1978). According to Assistant Managing Editor Robert E. Lee, OPUBCO intended that the cartoon convey the impression of a conspiracy.[18] (Vol. II, 36) In both the *Goldwater* and the *Miskovsky* publications the seriousness of the charges necessitated a thorough investigation. In *Goldwater*, the court faulted the media defendant for a "slipshod and sketchy" investigation. In *Miskovsky*, an investigation was held only *after* the cartoon was printed—an investigation which could easily have been arranged prior to publication.

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actual malice where the publication presented a substantial danger to the reputation of the individual who was the target of the attack and the information was not "hot news" that could not wait another day or two before publication. The court also weighed the opportunity of the publisher to investigate whether the "keystone" fact in the story was true.

[18] The uncontroverted evidence at trial showed that OPUBCO's efforts were successful and that readers interpreted the "puppet" cartoon in a defamatory way. Petitioner testified to numerous hate calls and to having received in the mail the cartoon containing epithets drawn upon it by a reader. (App. 22a) Further, Assistant Managing Editor Robert E. Lee testified that following publication of the cartoon, there was talk going around town and at City Hall that Miskovsky and Points had engaged in a conspiracy. (Vol. II, 26-27)

In sum, a failure to investigate, the absence of any "hot news" value, the publisher's intent to get Miskovsky, and the ease with which an investigation could have been conducted, all support the jury's conclusion that the cartoon was published with actual malice. The Oklahoma Supreme Court erroneously failed to consider these other circumstances, as required by *Gertz* and *St. Amant*. Accordingly, this Court should reinstate the jury's verdict.

III. ASSUMING THAT EXPRESSIONS OF PURE OPINION ARE CONSTITUTIONALLY PROTECTED UNDER *GERTZ* v. *WELCH*, THERE WAS SUFFICIENT EVIDENCE OF UNDISCLOSED DEFAMATORY FACTS IN THE THREE ARTICLES AND EDITORIAL FOR THE ISSUE OF LIBEL TO BE SUBMITTED TO THE JURY.

In deciding that the three newspaper articles and the editorial were not defamatory, the Oklahoma Supreme Court ruled that the contents of the articles and the editorial were not actionable because they were pure opinion rather than statements of fact.[19] The Oklahoma Supreme Court in its decision appears to rely on the federal Constitution since the court does not cite any state law. The court, however, refers to only one federal case to support its belief that no reader could have thought that the statements in OPUBCO's editorial in fact accused petitioner of committing criminal libel. With respect to the other findings of privileged opinion, the Oklahoma Su-

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[19] The rationale of the Oklahoma Supreme Court may be explained with reference to the view expressed in the *Restatement (Second) of Torts* § 566, Comment C (1977), which states that actions for defamation on the basis of an expression of pure opinion appear to have been rendered unconstitutional by *Gertz* v. *Welch*. In *Gertz*, this Court said:

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries, but on the competition of other ideas. 418 U.S. at 339-340.

The Oklahoma Supreme Court incorrectly stated that Miskovsky in his brief conceded that statements of opinion are not actionable. (See App. 12a and Appellant's Brief at 38-42)

preme Court articulates no standard or rationale for determining what is opinion, mixed opinion and fact, or opinion which implies the existence of defamatory facts. It simply acted as the "thirteenth" member of the jury.

The full impact of *New York Times* and its progeny on the common law of defamation is unclear and this is an area where there is considerable confusion. For example, a leading commentator has said:

> Determining what is defamatory may have constitutional implications, although few cases have explored them. The theory seems to be that, as a matter of constitutional law, the First Amendment thumb is put on the balance in favor of finding expression to be non-defamatory.

R. D. Sack, *Libel, Slander, and Related Problems* 83 (1980). Other courts have also concluded that pure opinion is not actionable under the Constitution. *E.g.*, *Gregory* v. *McDonnell Douglas Corp.*, 17 Cal.3d 596, 131 Cal. Rptr. 641, 552 P.2d 425 (1976); *Information Control Corp.* v. *Genesis One Computer Corp.*, 611 F.2d 781 (9th Cir. 1980); *Pease* v. *Telegraph Publishing Co., Inc.*, 121 N.H. 62, 426 A.2d 463 (1981). This Court, however, has never required the absolute privilege accorded here by the Oklahoma Supreme Court.[20]

In *Greenbelt Cooperative Publishing Association* v. *Bresler*, *supra*, 398 U.S. at 6, the only case cited by the Oklahoma Supreme Court in its discussion of opinion and defamatory meaning, Mr. Justice White addresses in his concurring opinion the issue of words with double meaning.

> Should *New York Times Co.* v. *Sullivan* . . . be extended to preclude liability for injury to reputation caused by employing words of double meaning, one of which is libelous, whenever the publisher claims in

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[20] Under Oklahoma law, whether a statement is defamatory is "measured by its natural and probable effect upon the mind of the average lay reader." *Wimmer* v. *Oklahoma Publishing Co.*, *supra*, 1 P.2d at 673.

> good faith to have intended the innocent meaning? I think not.
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> But it is quite a different thing, not involving the same danger of self-censorship, to immunize professional communicators from liability for their use of ambiguous language and their failure to guard against the possibility that words known to carry two meanings, one of which imputes commission of a crime, might seriously damage the object of their comment in the eyes of the average reader. I see no reason why the members of a skilled calling should not be held to the standard of their craft and assume the risk of being misunderstood—if they are—by the ordinary reader of their publication.

In concluding that the statement made by OPUBCO that "[a]llegations against Gov. David Boren raised by fellow U.S. Senate candidates George Miskovsky and Anthony Points spurred a storm of indignation" did not imply that petitioner brought up this issue on his own or in cooperation with Points, the Oklahoma Supreme Court relied upon one of several dictionary definitions of the word "raised." (App. 12a) It is clear that there are other meanings for the word "raised" and that a reader might reasonably conclude from the use of the word that petitioner stirred up the issue on his own or in a conspiracy with Points. This is particularly true when the statement is immediately combined with the republishing of untrue statements made by others accusing Miskovsky of actually making the allegations. (App. 10a-12a) The determination of the meaning attached to such words was properly left to the jury.

The Oklahoma Supreme Court mistakenly relied on *Greenbelt Cooperative Publishing Association*, *supra*, in dismissing petitioner's libel claim relating to the editorial. In *Greenbelt*, the Court decided that the word "blackmail" was not libelous, but reached this conclusion only after considering all of the circumstances, which are sharply different from those found here. *Id.*, at 13. The Court found that the use of the word "blackmail" constituted an "accurate and truthful report(s) of what

had been said at a public hearing." *Id.*, at 12. The word was used in an article discussing a public debate whereby the paper was "performing its wholly legitimate function." *Id.*, at 13. This Court did not decide in *Greenbelt* that expressions of opinion could *never* be libelous. The Court concluded only that the use of the word "blackmail" was not defamatory in an article where no reader could have thought that the plaintiff was actually being charged with "blackmail" and where the defendant was printing "accurate and truthful reports." [21] The facts in *Miskovsky* are sharply different because OPUBCO was not merely reporting what had been said, but was accusing petitioner of "scurrilous defamation"; OPUBCO was editorializing in order to subvert Miskovsky's candidacy for public office and was not fulfilling its traditional First Amendment role.

The third newspaper article entitled "Boren's Friends Express Disgust" also contains defamatory statements because OPUBCO repeated a comment made by Ward Lynn that Miskovsky was the "hatchet man" in the campaign. This characterization is not pure opinion protected by the First Amendment because a typical reader could easily have concluded that petitioner was being charged with illegal or immoral acts. The jury could have concluded that OPUBCO printed the comment made by a partisan individual who was not part of the campaign because doing so was useful to OPUBCO's plan to "blister" Miskovsky.

Also, the newspaper editorial, in addition to characterizing Miskovsky's words as "scurrilous defamation," accuses petitioner of "gutter theatrics" and states that he is a "defender of scoundrels." [22] Contrary to the view of

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[21] In circumstances different from those in *Greenbelt* the question of whether a reference to "blackmail" constituted an accusation of a crime was left for the jury to decide. *Good Government* v. *Superior Court*, 22 Cal.3d 672, 150 Cal. Rptr. 258, 586 P.2d 572, 576 (1978), *cert. denied*, 441 U.S. 961 (1979).

[22] OPUBCO did not controvert the evidence Miskovsky presented at trial that he has never engaged in gutter theatrics in the court-

the Oklahoma Supreme Court, these are not constitutionally protected statements of opinion. In the totality of the circumstances, the characterization of petitioner's words as "actionable" falsely accuses petitioner of criminal libel. Courts and commentators have concluded that expressions of opinion mixed with fact and statements of opinion which imply the existence of undisclosed defamatory facts do not enjoy the protection of the First Amendment. *Buckley* v. *Littell*, 539 F.2d 882 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977); *Restatement (Second) of Torts* § 566. In sum, the Oklahoma Supreme Court opinion erroneously decided that the Constitution rendered OPUBCO's publications not actionable and accordingly should be reviewed by this Court.

IV. THE FIRST AND FOURTEENTH AMENDMENTS PROHIBIT A RULE OF LAW WHICH GRANTS VIRTUAL ABSOLUTE IMMUNITY TO A MEDIA DEFENDANT FROM LIBEL SUITS BROUGHT BY A PUBLIC FIGURE BECAUSE SUCH A RULE WOULD CHILL THE FIRST AMENDMENT RIGHTS OF PETITIONER AND OTHER CANDIDATES FOR PUBLIC OFFICE.

The First Amendment fulfills an important function in our society in preserving the integrity of the electoral process. As this Court has observed, "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of gov-

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room and has never been a defender of scoundrels. Nor did OPUBCO dispute Miskovsky's evidence that there never was any conspiracy between himself and Points. (Vol. I, 39, 54-55) The conclusion that these accusations were leveled at Miskovsky without any subjective belief or concern for whether or not they were true is inescapable. As Chief Justice Burger noted:

> [T]he advocate is not to be invidiously identified with his client. The important public policy which underlies this tradition—the right to counsel—would be gravely jeopardized if every lawyer who takes an 'unpopular' case, civil or criminal, would automatically become fair game for irresponsible reporters and editors . . . . *Gertz* v. *Welch*, *supra*, 418 U.S. at 355 (Burger, C.J., dissenting).

ernment established by our Constitution." *Buckley* v. *Valeo*, 424 U.S. 1, 14 (1976). The constitutional guarantee of freedom of speech "has its fullest and most urgent application precisely to the conduct of campaigns for public office." *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 272 (1971). "The candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election." *Buckley* v. *Valeo*, *supra*, 424 U.S. at 52. "Democracy depends on a well informed electorate, not a citizenry . . . limited in its ability to discuss and debate candidates and issues." *Id.* at 49, n.55. Further, "the press does not have a monopoly on either the First Amendment or the ability to enlighten." *First National Bank of Boston* v. *Bellotti*, 435 U.S. 776, 782 (1978); *Cf. Pell* v. *Procunier*, 417 U.S. 817 (1974). "[T]he purpose of the Constitution was not to erect the press into a privileged institution but to protect all persons in their right to print what they will as well as to utter it." *Id.*, at 802 (Burger, C. J., concurring), citing *Pennekamp* v. *Florida*, 328 U.S. 331, 364 (1946) (Frankfurter, J., concurring). "And self-government suffers when those in power suppress competing views on public issues 'from diverse and antagonistic sources.'" *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945), cited in *Bellotti*, *supra*, 435 U.S. at 777, n.12. The Oklahoma Supreme Court decision overturning the libel verdict in favor of petitioner infringes upon petitioner's First Amendment rights and encourages OPUBCO to limit public debate in future elections.

The evidence presented at petitioner's trial clearly demonstrates that OPUBCO sought to "blister" petitioner in a race for public office by knowingly publishing defamatory falsehoods about him in order to limit debate on public issues and to infringe on petitioner's First Amendment rights. A jury of Oklahoma citizens correctly understood OPUBCO's intent and responded with the largest jury verdict in favor of a candidate for political office in the United States. While awarding petitioner

actual damages of $35,000, the jury sought to deter OPUBCO from violating the First Amendment rights of other candidates for public office by awarding exemplary damages of $965,000.

The Constitution serves significant societal interests and often protects interests broader than those of the party seeking their vindication. As this court emphasized in *Bellotti*, *supra*, 435 U.S. at 776:

> Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period. *Thornhill* v. *Alabama*, 310 U.S. 88, 101-102 (1940).

"[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley* v. *Valeo*, *supra*, 424 U.S. at 48-49.

The Oklahoma Supreme Court struck down this verdict of a properly instructed jury that had seen and heard persuasive evidence of OPUBCO's improper conduct. To allow the Oklahoma Supreme Court decision to stand would effectively grant OPUBCO immunity and permission to knowingly defame and villify any candidate not to its liking under the cloak of the First Amendment.[23]

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[23] OPUBCO has not lost a libel case since 1927 when a $1000 jury verdict in favor of a municipal judge was upheld on appeal. *Oklahoma Publishing Co.* v. *Tucker*, 254 P. 975 (Okla. 1927). There are six other reported libel cases against OPUBCO, all brought by public figures, but none in the past fifty years. *Cobb* v. *Oklahoma Publishing Co.*, 140 P. 1079 (Okla. 1914); *Matthews* v. *Oklahoma Publishing Co.*, 219 P. 947 (Okla. 1923); *Oklahoma Publishing Co.* v. *Kendall*, 221 P. 762 (Okla. 1924); *Oklahoma Publishing Co.* v. *Gray*, 280 P. 419 (Okla. 1929); *Wimmer* v. *Oklahoma Publishing Co.*, *supra*.

According to a recent survey, plaintiffs suing media defendants fare badly and win judgments in only 5% of the media appeals. The survey included only reported cases, most of which were appellate cases. Therefore, the survey seems to overstate the likelihood of a successful suit for libel by a public figure because defendants

Further, to allow the decision to stand will discourage many good men and women from entering the political arena for fear of becoming subject to the same type of attack by irresponsible members of the press.

"The authors of the Bill of Rights did not undertake to assign priorities" to constitutional rights. *Nebraska Press Association* v. *Stuart*, *supra*, 427 U.S. at 561. Nor did the authors of the Bill of Rights intend that freedom of the press vested in a multi-media conglomerate be abused with impunity and with immunity in such a fashion as to stifle petitioner's First Amendment rights.[24] The policies and political principles underlying the Bill of Rights require a balancing between petitioner's right to protect his reputation and to speak freely during a campaign for public office and OPUBCO's right of fair comment. The grant of virtual absolute immunity to OPUBCO would require a candidate who runs for public office without OPUBCO's endorsement to sacrifice his right of free speech and his right to his good name as a condition of candidacy, contrary to *Nebraska Press Association*.[25] Accordingly, this Court should grant review

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are much less likely to accept adverse judgments at the trial level than are plaintiffs. Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, Am. Bar Foundation Research J., 493, 498 (Summer 1980).

[24] In its attack on petitioner, OPUBCO is also restricting the access of Oklahomans to the ballot, effectively burdening two separate rights—"the right of individuals to associate for the advancement of political beliefs and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Williams* v. *Rhodes*, 393 U.S. 30 (1968), cited in *Illinois State Board of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 184 (1979). By infringing on petitioner's rights, OPUBCO "impairs the voters' ability to express their political preferences." *Id.* In his action for defamation petitioner thus seeks to vindicate these rights as well.

[25] State constitutions approved contemporaneously with the passage of the Bill of Rights do not reveal any settled belief that civil awards of damages for defamation were inconsistent with the right of free speech and free press; in fact, some state constitu-

in this case to protect the First Amendment rights not only of petitioner, but of all Oklahoma citizens.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision of the Supreme Court of Oklahoma reversed with directions that the judgment of the District Court of Cleveland County, Oklahoma, be reinstated.

Respectfully submitted,

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tional provisions adopted in the late eighteenth and early nineteenth centuries expressly stated that the rights of free speech and free press could be abused by defamation. L. H. Eldredge, *supra*, § 49 at 248. Neither did the states intend to modify their own laws concerning defamation when they ratified the Fourteenth Amendment. *Id.*, at 251.